FILE COPY

FILED
JUN 18 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. [redacted] 142

COLEMAN F. MADDEN,

Petitioner,

AGAINST

QUEENS COUNTY JOCKEY CLUB, INC.,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, County of Queens and Brief in Support Thereof.

RAPHAEL H. WEISSMAN,
Attorney for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

SUBJECT INDEX.

	PAGE
Petition for Writ	1
Opinions Below	4
Jurisdiction	5
Question Presented	6
Specification of Errors to Be Argued	6
Reasons for Granting the Writ	7
New York State Constitution and Statute Involved	7
Affidavit of Petitioner and Certificate of Counsel	11
Brief in Support of Petition	12
Jurisdiction	12
Statement	12
Summary of Argument	13
POINT I.—The right to participate in pari-mutuel as authorized by the statute is a privilege within the equal protection of the laws	17
POINT II.—Since the statutory privilege is confined in its operation to licensed race tracks, all must be accorded equal opportunity for admission in order to make the statutory privilege equally available to all	20

PAGE

POINT III.—At least to the extent of the monopoly created by the license, a pari-mutuel licensee exercises official power which subjects him equally with the State to the obligation of the equal protection of the laws 22

POINT IV.—The chief error below lurks in the failure to perceive that at least to the extent of the monopoly created thereby, a pari-mutuel license is a franchise, subject to equal accommodation 25

POINT V.—The substantial Constitutional question of the equal protection of the laws in the circumstances disclosed by the petition has not heretofore been determined by this Court. It was decided by the New York Court of Appeals in conflict with principles of decisions of this Court. It is not only in the interests of substantial justice, but it is also in the interests of the integrity of the basic guarantees of the Constitution that this case should be reviewed by this Court 27

CONCLUSION 28

APPENDIX 29

CASES CITED.

	PAGE
Aaron v. Ward, 203 N. Y. 351	17, 26
Adams v. United States, 317 U. S. 264	5
Abrams v. United States, 250 U. S. 616, 630	13, 27
Barbier v. Connolly, 113 U. S. 27	13, 18, 21
Charleston Federal S. & L. Ass'n v. Alderson, 324 U. S. 182	6
Connolly v. Union Sewer Pipe Co., 184 U. S. 540	18
Hayes v. Missouri, 120 U. S. 68	17, 20, 21
Kotch v. Board of River Port Pilot Com'rs, No. 384, October Term, 1946, Decided March 31, 1947	14, 22
Marrone v. Washington Jockey Club, 227 U. S. 633	15, 24
Nixon v. Condon, 286 U. S. 73	14, 23, 25
People v. Sullivan, 60 Cal. App. 2nd 539	20
Soon Hing v. Crowley, 113 U. S. 703	13, 18
Western Turf Association v. Greenberg, 204 U. S. 59	15, 24
Woollcott v. Shubert, 217 N. Y. 212	17, 26
Yick Wo v. Hopkins, 118 U. S. 356	14, 17, 20, 21, 22

STATUTES AND AUTHORITIES CITED.

Constitution of N. Y. State, Article I, Section 9	2, 7
Laws of 1940, Chapter 254, Section 2	2, 8
Laws of 1940, Chapter 254, Section 4	9
28 U. S. C. A., Sec. 344b	5, 12
United States Constitution, Fourteenth Amendment, Section 1	3, 7, 13
New York State Racing Commission, Rules and Regulations, Article VI, Section 30 (b)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

COLEMAN F. MADDEN,
Petitioner,

AGAINST

QUEENS COUNTY JOCKEY CLUB, INC.,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, County of Queens.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Coleman F. Madden, respectfully represents to this Court:

FIRST: On April 17, 1947, the Court of Appeals, the highest court of the State of New York in which a decision could be had, affirmed a final judgment dismissing petitioner's complaint, wherein petitioner claimed and was denied the equal right and privilege with all other persons—under the Constitutional guaranty of the equal protection of the laws—to participate in pari-mutuel betting at

a licensed race track as specially authorized by a statute of the State of New York (R. 23-27, 55-61).

SECOND: The Constitution of the State of New York prohibits all forms of betting "except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government" (Article I, Section 9). Pursuant to the authorization of the State Constitution, New York enacted a law known as Chapter 254 of the Laws of 1940, wherein it was provided, in part, that "pari-mutuel betting shall only be conducted within the grounds or enclosure of a race track" pursuant to a "license to conduct pari-mutuel betting from the New York State Racing Commission."

THIRD: Petitioner's complaint alleges that petitioner is a natural born citizen and a resident and taxpayer of the State of New York; that respondent, a domestic corporation, as owner of Aqueduct Race Track conducts horse races and pari-mutuel betting by license from the New York State Racing Commission; that in July, 1945, petitioner tendered the admission price and sought admission to Aqueduct for the purpose of participating in pari-mutuel betting, but that without cause or excuse respondent barred petitioner and stated to petitioner its purpose to continue to bar him in future; that in conducting pari-mutuel betting respondent is exercising a franchise granted to it by the State of New York and that consequently respondent is under a duty to accord to all persons the equal right and privilege of patronizing pari-mutuel betting; that respondent's acts in the past and threats for the future are arbitrary and discriminatory and constitute a denial to petitioner of "the equal protection of the laws (contrary to the New York State Constitution and) con-

trary to Section 1 of Amendment XIV of the Constitution of the United States" (R. 23-27).

FOURTH: Upon the complaint and affidavits, petitioner moved at Special Term of the Supreme Court of the State of New York, County of Queens, for an order enjoining respondent during the pendency of the action from preventing petitioner's exercise of his equal right and privilege of participating in pari-mutuel betting (R. 67).

FIFTH: The moving affidavits show that the New York Times erroneously reported testimony given at a public hearing in a disbarment proceeding. The testimony as given was that one "Owney" Madden was a bookmaker; the New York Times erroneously reported that "Coley" Madden was the alleged bookmaker (R. 8-20).

SIXTH: The moving affidavits, further, show that petitioner was originally barred upon the basis of the erroneous New York Times account, but that, after the proofs were delivered to it in this action that it was wrong, respondent, nevertheless, continued to bar petitioner and took the position that it could do so by its arbitrary will (R. 9-10).

SEVENTH: Respondent did not answer the complaint and did not controvert the facts set forth in the moving papers, but merely served a cross-notice of motion to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action (R. 21).

EIGHTH: Special Term held as a matter of law that respondent did not have the "absolute right" to exclude (R. 32), and, finding as a fact that petitioner "is a citizen of good repute and standing" (R. 28), it denied the

motion to dismiss the complaint and granted the temporary injunction (R. 33).

NINTH: Upon respondent's appeal, the Appellate Division of the Supreme Court, solely as a matter of law and not disputing Special Term's finding that petitioner is a citizen of good repute and standing, rendered final judgment dismissing the complaint and dissolved the injunction upon the ground that respondent had a right to "choose" its patrons (R. 43-44).

TENTH: Upon petitioner's appeal, the decision of the New York Court of Appeals, described in paragraph "FIRST" of this petition, affirmed the judgment rendered by the Appellate Division, also solely as a matter of law, holding that respondent has the power to exclude "solely of his (its) own volition" (296 N. Y. 249 at p. 253).

ELEVENTH: On May 16, 1944, upon the decision of the New York Court of Appeals, there was entered in the office of the Clerk of Queens County, who is the Clerk to the Supreme Court, Queens County, a judgment affirming the final judgment dismissing the complaint that was rendered by the Appellate Division and entered in the same County Clerk's office, where all the records of this case are lodged.

Opinions Below.

All three Courts below rendered opinions. The Special Term opinion (R. 28-33) is not officially reported. The Appellate Division opinion (R. 41-44) is reported in 269 App. Div. 644. The Court of Appeals' opinion (R. 55-61) is printed as an appendix to the brief in support of this petition and is reported in 294 N. Y. 249.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344b). The decision of the New York Court of Appeals, the highest court of the State in which a decision could be had, affirming the final judgment dismissing petitioner's complaint was rendered on April 17, 1947 (R. 55).

A judgment of affirmance was entered upon the New York Court of Appeals' decision on May 16, 1944, in the office of the Clerk of the County of Queens, who is Clerk of the Supreme Court of the State of New York, County of Queens, where all the records of this case are lodged (R. 52-54). The writ of certiorari should, therefore, be directed to the Supreme Court of the State of New York, County of Queens (*Adams* v. *United States*, 317 U. S. 264).

Petitioner's complaint, which was dismissed, claimed a right and privilege under the Constitution of the United States. Paragraph 11 of the complaint reads, as follows (R. 25-26):

> "That defendant's acts in the past and threats for the future in excluding plaintiff from the race track at Aqueduct and from attending horse races and from patronizing pari-mutuel betting conducted thereon during race meetings held and to be held pursuant to license from the State Racing Commission are arbitrary and discriminatory and that said acts and threats by defendant deny to plaintiff the equal protection of the laws, contrary to Section 11 of Article I of the Constitution of the State of New York and contrary to Section 1 of Amendment XIV of the Constitution of the United States."

The Federal right and privilege set up in the complaint was argued in the Court below. The New York Court of

Appeals in its opinion thus describes petitioner's position (296 N. Y. at p. 254):

> "Plaintiff, however, asserts a right founded upon the constitutional guaranty of equal protection of the laws."

The case relied upon to sustain jurisdiction is *Charleston Federal S. & L. Ass'n.* v. *Alderson* (324 U. S. 182).

The question presented is one of substance as is more fully shown in the brief in support of this petition.

Question Presented.

Whether—in view of the Constitutional guaranty of the equal protection of the laws—petitioner, a citizen of good repute and standing, may be denied the equal right and privilege under a statute of the State of New York, which authorizes pari-mutuel betting only within the confines of a licensed race track, by permitting the licensee arbitrarily to exclude him from the race track?

Specification of Errors to Be Argued.

The New York Court of Appeals erred in the following respects:

1. The right to participate in pari-mutuel as authorized by the statute is a privilege within the equal protection of the laws.

2. Since the statutory privilege is confined in its operation to licensed race tracks, all must be accorded equal opportunity for admission in order to make the statutory privilege equally available to all.

3. At least to the extent of the monopoly created by the license, respondent as pari-mutuel licensee exercises

official power which subjects it equally with the State to the obligation of the equal protection of the laws.

4. The chief error below lurks in the failure to perceive that at least to the extent of the monopoly created thereby, a pari-mutuel license is a franchise, subject to the equal protection of the laws.

Reasons for Granting the Writ.

(1) The petition presents a substantial question under Section 1 of Amendment XIV of the Constitution which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

(2) The question presented is not ruled by any decision of this Court.

(3) The decision below conflicts with principles laid down in decisions of this Court.

(4) No matter what the cause out of which it arises, the transcendent Constitutional question presented by the exercise of concededly arbitrary power to discriminate under license of a State statute is worthy of a hearing and final decision by this Court.

New York State Constitution and Statute Involved.

Section 9 of Article I of the Constitution of the State of New York, as amended and approved November 7, 1939, effective January 1, 1940, provides as follows:

> "No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due

judicial proceedings; no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section."

Section 2 of Chapter 254 of the Laws of 1940, effective March 31, 1940, provides as follows:

"In the exercise of the authority vested in it by section nine of article one of the state constitution, as amended by vote of the people at the general election in November, nineteen hundred thirty-nine, the legislature hereby prescribes that pari-mutuel betting on horse races shall be lawful in this state if conducted in the manner and subject to the conditions and supervision provided by this act, notwithstanding the provisions of any other law, general, special or local, prohibiting or restricting lotteries, pool selling or book-making, or any other kind of gambling; it being the purpose of this act to derive from such betting as herein authorized a reasonable revenue for the support of government and to promote agriculture generally and the improvement of breeding of horses particularly in the state. Such pari-mutuel betting shall only be conducted within the grounds or enclosure of a race track on races at such track and on such dates when racing at such track shall have been authorized pursuant to this act."

Section 4 of the same act provides as follows:

> "Any corporation or association, at the time of making application to the state racing commission for a license to conduct a race course or a race meeting for running races or steeplechases, or at such subsequent time as the state racing commission may permit, may apply to such commission for a license to conduct at such race meeting parimutuel betting on the races to be run thereat. The state racing commission may prescribe the form in which such application shall be made and the information to be furnished by such corporation or association. If the commission be satisfied from such application, or from other sources of information, that the race track of such corporation or association for which such application is made has facilities and equipment sufficient to accommodate its probable number of patrons, it shall issue to such corporation or association a license to conduct parimutuel betting in the manner and subject to the conditions described in such license on the days specified in such license."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of New York, County of Queens, directing that Court to certify and send to this Court for its review and determination on a day to be named therein, a full and complete transcript of the record and all proceedings of said Court herein, being the remittitur from the New York Court of Appeals entitled "*Coleman F. Madden, plaintiff-appellant,* v. *Queens County Jockey Club, Inc., defendant-respondent,*" decided April 17, 1947, and the order and final judgment entered in the Supreme Court of the State of New

York, Queens County, upon said remittitur, all filed under file No. 1486—1945, and that the judgment of said Court so entered upon the remittitur of the New York Court of Appeals be reviewed by this Court and for such other relief of this Court as may seem proper.

Dated: June 16, 1947.

COLEMAN F. MADDEN,
Petitioner.

RAPHAEL H. WEISSMAN,
Attorney for Petitioner.

Affidavit of Petitioner and Certificate of Counsel.

STATE OF NEW YORK,
COUNTY OF KINGS. } SS.:

COLEMAN F. MADDEN, being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

COLEMAN F. MADDEN.

Sworn to before me this
16th day of June, 1947.

GERTRUDE E. MAGUIRE
Notary Public in the
State of New York.
Residing in Queens Co.
Queens County Clerk's No. 1618.
Kings County Clerk's No. 199.
Commission expires March 30, 1948.

STATE OF NEW YORK,
COUNTY OF KINGS. } SS.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

RAPHAEL H. WEISSMAN,
Attorney for Petitioner.

Dated, Brooklyn, New York, June 16, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

COLEMAN F. MADDEN,
Petitioner,

AGAINST

QUEENS COUNTY JOCKEY CLUB, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344b) upon the grounds and under the authorities set forth in the jurisdictional statement of the petition.

Statement.

A complete statement of the case is set forth in the annexed petition and for the sake of brevity will not be repeated here.

Summary of Argument.

Section 1 of the Fourteenth Amendment of the Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws". The Court below sanctioned arbitrary discrimination against petitioner—"a citizen of good repute and standing" (R. 28)—under license of a New York State statute. The Constitutional question thus presented is worthy of a hearing and final decision by this Court.

It is no lesser claim to protection that the discrimination concerns pari-mutuel betting. For the all important concern in this Court is the Constitutionality of the discrimination. On the contrary, the real test of the integrity of the Constitutional guaranty is the indifferent or even the odious privilege. There rarely is need for protection of the privilege that the community esteems. So much needs immediately to be said because the substantial and important Constitutional question at bar could easily be obscured by individual predilections. Mr. Justice Holmes, whose constant teaching was that the two must be kept apart, said of another of the great guaranties in a memorable dissent, that we should be eternally vigilant against attempts to check the expression of opinions that we "loathe" (*Abrams* v. *United States*, 250 U. S. 616, 630).

The "equal protection of the laws" guaranteed by the Fourteenth Amendment contemplates that "no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances" (*Barbier* v. *Connolly*, 113 U. S. 27 at p. 31); it requires the "same privileges under the same conditions" (Id. at p. 31) and prohibits "different privileges under the same conditions" (*Soon Hing* v. *Crowley*, 113 U. S. 703 at p. 709). There can be little doubt that the statutory privilege to participate in pari-mutuel betting comes within the broad compass of equal protection as thus defined.

If the statute provided in express terms that parimutuel betting at licensed race tracks were permitted to all except the petitioner, there can be equally little doubt that it would infringe the Fourteenth Amendment. Can the same result be accomplished by licensing others to administer the act and by giving the licensees arbitrary power to exclude petitioner from participation? *Qui facit per alium facit per se.* It is well established by the decisions of this Court that if a statute is administered by "public authority" with an "unequal hand" there is a denial of equal protection within the prohibition of the Constitution (*Yick Wo* v. *Hopkins*, 118 U. S. 356, at pp. 373-374; *Kotch* v. *Board of River Port Pilot Com'rs*, No. 384, October Term, 1946, Decided March 31, 1947).

It remains to be seen whether the statute is being administered by "public authority", because it is admittedly being done by "unequal hand". As licensee respondent wields "public authority" subject to the obligation of equal protection. For the Constitutional restraint binds all delegates of official power equally with government officers in the proper sense of that word. Mr. Justice Cardozo put it thus (*Nixon* v. *Condon*, 286 U. S. 73, at pp. 88-89):

> "The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power. * * * The test is not whether the members of the executive committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in

such a sense that the great restraints of the Constitution set limits to their action."

Since the statute permits the conduct of pari-mutuel only at licensed race tracks and forbids it anywhere else, the license not only grants a permit, but it also grants a monopoly. Certainly to the extent of the monopoly granted by the license, respondent is "invested with an authority independent of the will of the association." Certainly to the extent of the monopoly granted by the license, respondent is a repository "of official power". For equally certainly the monopoly depends solely upon the statute. Exercising "authority independent of the will of the Association" as a repository "of official power" granted to it by the license, respondent is under like restraint with any organ of the State not to apply it with "unequal hand".

It is no answer to all this for respondent to say that its race track is private property (*Marrone* v. *Washington Jockey Club*, 227 U. S. 633; *Western Turf Association* v. *Greenberg*, 204 U. S. 59). For petitioner does not claim that an obligation to accord equal accommodation arises as an incident of the mere ownership of a race track. Nothing more than this is negatived by the cited cases. The point here is that it arises out of the acceptance of the license. The licenses under the statute at bar are not forced on race track proprietors. They are, on the contrary, much coveted by them, because the monopolies created by the licenses are enormously profitable.

The Court below erred chiefly because it failed to give effect to the monopoly granted by a license under the statute. For the New York Court of Appeals does not deny the obvious proposition that if the license is a franchise, then the licensee must accord equal accommodation. The holding of that Court is that the license is not a franchise. In its opinion (296 N. Y. at p. 255):

> "A franchise is a special privilege, conferred by state on an individual, which does not belong to the individual as a matter of common right."

The reason why the pari-mutuel license was held not to be a franchise is stated in its opinion, as follows (296 N. Y. at p. 256):

> "Observing, however, that the conduct of races for stakes had long been declared illegal 'except as specially authorized', plaintiff argues from that that the license was in effect a franchise, since it granted a privilege not previously enjoyed by common right. That, though, overlooks the fact that the privilege of conducting horse races for stakes does exist at the common law, that it is taken away only by statute, and that the statute's prohibition is removed only under certain circumstances and upon compliance with specified conditions. (See *Corrigan* v. *Coney Island Jockey Club, supra; cf. Marrone* v. *Washington Jockey Club, supra; Western Turf Association* v. *Greenberg,* 204 U. S. 59.) Consequently, the license, instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute."

It is not apparent why a special privilege is any the less a special privilege, merely because it restores a pristine common law right, which is denied to all others by the State Constitution and statute. But even if the license restores a common law right, yet it restores it with a monopoly. Whatever may be said of the common law right to bet, certainly the monopoly feature of the license is solely a creature of the statute. At least to the extent of the monopoly that such a license grants, therefore, the license is a franchise even within the meaning of that

term as defined in the opinion of the New York Court of Appeals.

By the same token may be distinguished the bathhouse license in *Aaron* v. *Ward* (203 N. Y. 351) and the theatre license in *Woollcott* v. *Shubert* (217 N. Y. 212), as well as all the other licenses cited by the Court of Appeals' opinion. It is not illegal to go surf bathing outside of a licensed bathhouse; it may be done all along the surf. So, too, it is not illegal to do a play outside of a licensed theatre; it may be done at home, at school, at church, in a grove and at any other convenient place. These licenses and the others cited by the Court of Appeals grant permits, but they do not grant monopolies.

The Fourteenth Amendment forbids "the play and action of purely personal and arbitrary power" (*Hayes* v. *Missouri*, 120 U. S. 68 at p. 71). The Court below held that a licensee under the statute "has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition" (296 N. Y. at p. 253). That the rights and privileges of "a citizen of good repute and standing" (R. 28) are subject to the "mere will of another" offends the basic concept of the constitution, that this is "a government of laws and not of men" (*Yick Wo* v. *Hopkins*, 118 U. S. 356 at p. 370).

POINT I.

The right to participate in pari-mutuel as authorized by the statute is a privilege within the equal protection of the laws.

All other betting being forbidden by the State Constitution, the statute creates a special privilege. As such, it must meet the requirements of the equal protection of the laws. It has been held that equal protection requires all persons to be treated alike "both in the privileges con-

ferred and the liabilities imposed" (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 at p. 559); and that all are entitled to "the same privileges under the same conditions" (*Barbier* v. *Connolly*, 113 U. S. 27 at p. 31). The "discrimination can be said to impair that equal right which all can claim in the enforcement of the laws", it was held in *Soon Hing* v. *Crowley* (113 U. S. 703 at p. 709), when the statute accords "different privileges under the same conditions".

It is no answer to petitioner's claim of "equal right" to say that the privilege of betting is not a matter of convenience or necessity to him. For whatever it is, petitioner is entitled to the same privilege as a matter of the equal protection of the laws. As this Court said in *Barbier* v. *Connolly* (113 U. S. 27 at p. 31), "no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances".

It is likewise no answer to petitioner's claim of "equal right" to say that in the exercise of the police power the State could prohibit pari-mutuel betting altogether. Having chosen as a matter of policy to permit it, it is not within the police power of the State to permit it to some and arbitrarily to deny it to others. So this Court held in *Connolly* v. *Union Sewer Pipe Co.* (184 U. S. 540), wherein it was written (at p. 558):

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which as often stated by this court, were not included in the grants of power to the general government, and therefore were rserved to the states when the constitution was obtained. * * * The state has undoubtedly the power, by appropriate legislation, to pro-

> tect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Moreover, the Rules and Regulations adopted by the New York State Racing Commission show that all legitimate ends of supervision in the exercise of the police power can, apparently, be accomplished without arbitrary power to exclude. For the Racing Commission requires exclusion only of those who are "known or reputed to be" bookmakers. Section 30(b) of Article VI of these Rules and Regulations provides, in pertinent part, as follows:

> "No person who is known or reputed to be a bookmaker * * * shall enter or remain upon the premises of any licensed Association conducting a racing meet under the jurisdiction of the Commission; and all such persons shall upon discovery or recognition be forthwith ejected."

And in this connection, it should be remembered that Special Term found that petitioner is "a citizen of good repute and standing" (R. 28) and that both the Appellate Division (R. 42) and the Court of Appeals (296 N. Y. 249 at p. 253) accepted that finding. Indeed, that fact is undisputed in the record (R. 28).

POINT II.

Since the statutory privilege is confined in its operation to licensed race tracks, all must be accorded equal opportunity for admission in order to make the statutory privilege equally available to all.

Not all discrimination is prohibited. Only arbitrary discrimination—"the play and action of purely personal and arbitrary power" (*Hayes* v. *Missouri*, 120 U. S. 68 at p. 71)—is prohibited. For the idea that anyone's rights are subject to the "mere will of another" offends the basic concept of the constitution, that this is "a government of laws and not of men" (*Yick Wo* v. *Hopkins*, 118 U. S. 356 at p. 370).

It is, thus, one thing to prescribe that those who wish to take advantage of their statutory privilege of pari-mutuel betting must do so within the confines of a licensed race track, even though this might discriminate against those who cannot conveniently come to the outskirts where the tracks are usually located and against those who cannot pay the price of admission. For it is necessary to confine the area of pari-mutuel betting in order effectively to supervise it and it is proper to permit a charge for admission in order to maintain the necessary race tracks for that purpose (*People* v. *Sullivan*, 60 Cal. App. 2nd 539). But it is quite another thing to prescribe that one who meets these conditions, that is to say, one who comes to the race track and offers to pay the price of admission, may nevertheless be denied the privilege of betting by the arbitrary act of the owner of the race track in refusing him admission without cause. If, as appears, the owner as licensee exercises official power to such an extent as to subject it equally with the state to the constitutional obligation of equal protection of the laws, then this constitutes a denial thereof. For it was

held by the Court of Appeals that the licensee may admit some and "exclude others solely of his own volition" (296 N. Y. 253). And the statute prohibits such betting outside of a race track.

This Court has frequently had occasion to point out that, where a statute is confined in its operation to a particular place, equal protection requires that all must be accorded the equal privileges of the statute in that place (*Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hayes* v. *Missouri*, 120 U. S. 68). Thus, in *Barbier* v. *Connolly*, this Court wrote (at pp. 30-31):

> "The specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of firewardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions, and are entitled to the same privileges under similar conditions."

And in *Hayes* v. *Missouri*, the same point was restated in these words (120 U. S. 68 at pp. 71-72):

> "The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

POINT III.

At least to the extent of the monopoly created by the license, a pari-mutuel licensee exercises official power which subjects him equally with the State to the obligation of the equal protection of the laws.

If the statute were to provide in express terms that pari-mutuel betting at licensed race tracks is permitted to all except the petitioner, there could be no doubt that it would infringe the Fourteenth Amendment. Could the same result be accomplished by licensing others to administer the act and by giving the licensees arbitrary power to exclude petitioner from participation? *Qui facit per alium facit per se.*

That such infringement may be shown by the uneven "administration" of a statute that is valid on its face, is the settled law of this Court (*Kotch* v. *Board of River Port Pilot Com'rs*, No. 384, October Term, 1946, Decided March 31, 1947; *Yick Wo* v. *Hopkins*, 118 U. S. 356). In the *Yick Wo* case, this Court wrote (pp. 373-374):

> "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

Applying the rule just quoted to the case at bar, it remains to be seen whether the instant statute is being administered "by public authority," for it is not denied that it is being done by "an unequal hand."

It is equally settled that within the quoted rule a statute may be considered as being administered by public authority where the "agencies are invested with an authority independent of the will of the association in whose name they undertake to speak," even though the agents are not, strickly speaking, state officers. Holding that for the purpose of voting in a primary, a political party was not a private club and was obliged to accord equal opportunity, Mr. Justice Cardozo explained this point in *Nixon* v. *Condon* (286 U. S. 73, at pp. 88-89) as follows:

> "The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power. * * * The test is not whether the members of the executive committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."

The fact that the statute permits pari-mutuel betting only at a licensed race track and expressly prohibits it anywhere else brings about two results. It not only grants the licensees a privilege, but it also grants them a monopoly. At least to the extent of the monopoly, the licensed race track operator is "invested with an authority independent of the will of the association." For surely the monopoly depends solely upon the statute. At least to the extent of the monopoly, therefore, the licensees become, again in Mr. Justice Cardozo's phrase, "the repositories of official power." And as such, like the state itself,

the licensees may not apply official power with unequal hand.

It is no answer to this to say that a race track is private property. For it is not claimed that an obligation to accord equal accommodation attaches to the mere ownership of a race track. The claim is that such obligation attaches to the license to conduct pari-mutuel betting. These licenses are not forced on race track proprietors. They are, on the contrary, much coveted by them, because the monopoly created by the licenses is enormously profitable. Section 9 of the New York State Pari-Mutuel Law, as last amended (Section 9, Chapter 254, Laws 1940, as last amended by Chapter 339, Laws 1946) provides that 6% of the total pool in the first zone and 5% of the total pool in the second zone shall be paid by the licensees who conduct pari-mutuel to the State and that 4% of the total pool in the first zone and 5% of the total pool in the second zone shall be retained by the licensees for their "own use and purposes." The World Almanac, 1947, page 40, shows that New York State's share of the pari-mutuel pools for the years 1945-1946, was $46,859,267.84. From this figure it becomes apparent how enormously profitable the monopoly was to the licensees. The income from the pari-mutuel monopoly to the licensed race track owners ranks high among the incomes of utilities during the same period.

Nothing more here relevant was in issue or decided in *Marrone* v. *Washington Jockey Club* (227 U. S. 633) or in *Western Turf Assoc.* v. *Greenberg* (204 U. S. 359) than that—as private owner—a race track proprietor may exclude any one at his pleasure. The point here is that he may not do so—as pari-mutuel licensee.

POINT IV.

The chief error below lurks in the failure to perceive that at least to the extent of the monopoly created thereby, a pari-mutuel license is a franchise, subject to equal accommodation.

One phase of the principle elaborated in the quotation from *Nixon* v. *Condon, supra,* is more bluntly stated by the familiar proposition that a grant of a monopoly is a grant of a franchise, which requires equal accommodation. It was the failure to give effect to the monopoly aspect of a pari-mutuel license that led the Court below astray. For the New York Court of Appeals does not deny the obvious proposition that if the pari-mutuel license is a franchise, then the licensee must accord equal accommodation. The holding of that Court is that the license is not a franchise. In its opinion (296 N. Y. at p. 255),

> "A franchise is a special privilege, conferred by state on an individual, which does not belong to the individual as a matter of common right."

The reason why the pari-mutuel license was held not to be a franchise is stated in its opinion, as follows (296 N. Y. at p. 256):

> "Observing, however, that the conduct of races for stakes had long been declared illegal 'except as specially authorized,' plaintiff argues from that that the license was in effect a franchise, since it granted a privilege not previously enjoyed by common right. That, though, overlooks the fact that the privilege of conducting horse races for stakes does exist at the common law, that it is taken away only by stat-

> ute, and that the statute's prohibition is removed only under certain circumstances and upon compliance with specified conditions. (See *Corrigan* v. *Coney Island Jockey Club, supra;* cf. *Marrone* v. *Washington Jockey Club, supra; Western Turf Association* v. *Greenberg,* 204 U. S. 359.) Consequently, the license, instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute."

It is not apparent why a special privilege is any the less a special privilege, merely because it restores a pristine common law right, which is denied to all others by the State Constitution and statute. But even if the license restores a common law right, yet it restores it with a monopoly. Whatever may be said of the common law right to bet, certainly the monopoly feature of the license is solely a creature of the statute. At least to the extent of the monopoly that such a license grants, therefore, the license is a franchise even within the meaning of that term as defined in the opinion of the New York Court of Appeals.

By the same token may be distinguished the bathhouse license in *Aaron* v. *Ward* (203 N. Y. 351) and the theatre license in *Woollcott* v. *Shubert* (217 N. Y. 212), as well as all the other licenses cited by the Court of Appeals' opinion. It is not illegal to go surf bathing outside of a licensed bathhouse; it may be done all along the surf. So, too, it is not illegal to do a play outside of a licensed theatre; it may be done at home, at school, at church, in a grove and at any other convenient place. These licenses and the others cited by the Court of Appeals grant permits, but they do not grant monopolies.

POINT V.

The substantial Constitutional question of the equal protection of the laws in the circumstances disclosed by the petition has not heretofore been determined by this Court. It was decided by the New York Court of Appeals in conflict with principles of decisions of this Court. It is not only in the interests of substantial justice, but it is also in the interests of the integrity of the basic guaranties of the Constitution that this case should be reviewed by this Court.

There is more danger to Constitutional rights to be apprehended from invidious rulings than from frontal attacks. Today discrimination is directed against the privilege of betting; tomorrow, against another privilege. Thus is set in motion that "corrosive process" of undermining the basic guaranties of the Constitution against which this Court has again and again sounded warning.

The privilege at bar should not be less an object of Constitutional solicitude than a privilege that holds a higher regard in the opinion of the community. For there very rarely is need for Constitutional protection of privileges in respect of activities which the community esteems. Mr. Justice Holmes said of another of the great guaranties of the Constitution, in a memorable dissent, that we should be eternally vigilant against attempts to check the expression of opinions that we "loathe" (*Abrams* v. *United States*, 250 U. S. 616, 630). For the test of the integrity of the Constitutional guaranty is freedom of the speech that is not favored. So, too, the test of the integrity of the guaranty of equal protection of the laws is the protection of the privilege that is not esteemed.

While pari-mutuel betting can hardly be said to be a privilege that is esteemed and in some communities it is altogether forbidden, yet in New York it is a privilege that is established by a State statute. As such, that is to say,

as a statutory privilege, the Constitutional protection of it as part of the equal protection of the laws transcends any question of the social aspects of pari-mutuel betting. New York State having as a matter of policy established by law the privilige of pari-mutuel betting, it is no answer to petitioner's claim to say that the privilege is not a matter of convenience or necessity to him. Whatever it is to anybody, petitioner is entitled to a like privilege as a matter of the equal protection of the laws.

There is no decision of this Court which rules the question. The New York Court of Appeals' decision conflicts with principles laid down in decisions of this Court, as is shown in the preceding points. The petition presents a substantial question based upon the Constitutional guaranty of the equal protection of the laws. In the recent world travail it was embattled democracy's proudest boast that all stand equal before its laws. The decision below sanctions the exercise of arbitrary discrimination under license of a State statute. It is unfortunate that not always is a stirring cause the vehicle of an important Constitutional question. But the importance is in the Constitutional question. No matter what the cause out of which it arises, the transcendent Constitutional question presented by the exercise of concededly arbitrary power to discriminate against "a citizen of good repute and standing" (R. 28) under license of a State statute is worthy of a hearing and final decision by this Court.

CONCLUSION.

The Petition for the Writ Should Be Granted.

Respectfully submitted,

RAPHAEL H. WEISSMAN,
Attorney for Petitioner.

Brooklyn, New York, June 16, 1947.

APPENDIX.

NEW YORK COURT OF APPEALS' OPINION.
(296 N. Y. 243)

COLEMAN F. MADDEN, Appellant, *v.* QUEENS COUNTY JOCKEY CLUB, INC., Respondent.

Decided April 17, 1947.

APPEAL from a judgment in favor of defendant, entered November 14, 1945, upon an order of the Appellate Division of the Supreme Court in the second judicial department which (1) reversed, on the law, an order of the Supreme Court at Special Term (NOVA, J.), entered in Queens County, granting a motion by plaintiff for a temporary injunction restraining defendant from preventing plaintiff from entering defendant's race track at Aqueduct and attending the horse races and patronizing the pari-mutuel betting conducted thereon, and denying defendant's cross motion for a dismissal of the complaint, on the law, and (2) denied plaintiff's motion and granted defendant's cross motion.

Raphael H. Weissman for appellant.

Conrad Saxe Keyes, Cyrus S. Jullien and *Joseph B. Cavallaro* for respondent.

Martin A. Schenck, Harold C. McCollom and *Kenneth W. Greenawalt* for Westchester Racing Association, The Saratoga Association, Metropolitan Jockey Club and Empire City Racing Association, *amici curiae,* in support of respondent's position.

FULD, J. "Owney" Madden was named by one Frank Costello in 1943 as a bookmaker with whom he placed bets. "Coley" Madden, plaintiff herein, a self-styled "patron of

the races", was barred by defendant from its Aqueduct Race Track in 1945, under the mistaken belief that he was Costello's bookmaker. Plaintiff thereupon sought a declaratory judgment declaring that he has a right, as citizen and taxpayer—upon paying the required admission price —to enter the race course and patronize the pari-mutuel betting conducted thereon. Defendant, on the other hand, asserted an unlimited power of exclusion. Special Term, finding that plaintiff was a citizen of good repute and standing, decided that the complaint stated a cause of action and entered an order enjoining defendant from keeping plaintiff off the race track. The Appellate Division, reversing, dismissed the complaint.

The question posed—which this court explicitly declined to consider in 1897, in *Grannan* v. *Westchester Racing Assn.* (153 N. Y. 449, 459)—is whether the operator of a race track can, without reason or sufficient excuse, exclude a person from attending its races. In our opinion he can; he has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin.

At common law, a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. (See e.g., *People* v. *King*, 110 N. Y. 418, 427; see, also, Wyman, Public Callings and the Trust Problem, 17 Harv. L. Rev. 156, 217.) On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. (See, e.g., *Woollcott* v. *Shubert*, 217 N. Y. 212; *Aaron* v. *Ward*, 203 N. Y. 351; *People ex rel. Burnham* v. *Flynn*, 189 N. Y. 180; *Collister* v. *Hayman*, 183 N. Y. 250.) A race track, of course, falls within that classification. (See *Marrone* v. *Washington Jockey Club*,

227 U. S. 633; [*Edward J.*] *Madden* v. *Queens County Jockey Club, Inc.*, 175 Misc. 522; *Corrigan* v. *Coney Island Jockey Club*, 2 Misc. 512.)

The common-law power of exclusion, noted above, continues until changed by legislative enactment. In this State, a statute—explicitly covering "race courses"—limits the power by prohibiting discrimination on account of race, creed, color, or national origin. (Civil Rights Law, § 40; see, also, Penal Law, §§ 514, 700.) That, then, is the measure of the restriction.

Plaintiff, however, asserts a right founded upon the constitutional guaranty of equal protection of the laws. The argument is based on two assumptions, first, that the license to conduct pari-mutuel betting constitutes the licensee an administrative agent of the State in the execution of the law, and, second, that the license to conduct horse racing is a franchise to perform a public purpose.

The first assumption is quickly disposed of. Section 9 of the Pari-Mutuel Revenue Law (L. 1940, ch. 254, § 9, as amd. by L. 1946, ch. 339) provides in substance that the licensee shall retain 10% of the total deposits and pay therefrom "to the state tax commission as a reasonable tax by the state for the privilege of conducting pari-mutuel betting", an amount equal to a certain percentage of the total pool. It should be noted that the tax is thus imposed not on the bettor for the privilege of *betting*—analogous to the imposition of a sales tax upon the purchaser from a retail store—but upon the licensee for the privilege of *conducting* pari-mutuel betting. Adopting plaintiff's position, it would be equally valid to argue that every licensee, theatre manager, cab driver, barber, liquor dealer, dog owner—to mention a few—must be regarded as "an administrative agency of the state" in the conduct of his everyday business simply because he pays a tax or fee for his license.

Plaintiff's second assumption—that the license is a franchise—requires more lengthy treatment. There is

little need to cite authority for the proposition that a race track is normally considered a place of amusement and that—with the possible exception of ancient Rome—amusement of the populace has never been regarded as a function or purpose of government. Horse racing does not become a function of government merely because, in sanctioning it, the Legislature anticipated a consequent, though incidental, advantage to the public in "improving the breed of horses." (L. 1926, ch. 440, §1; cf. *People ex rel. Empire City Trotting Club* v. *State Racing Commission*, 120 App. Div. 484, 485-486, affd. 190 N. Y. 31.) There is, then, nothing inherent in the nature of horse racing which makes operation of a race track the performance of a public function. If plaintiff's assumption were valid, it would follow that the mere fact of licensing makes the purpose a public one and the license in effect a franchise. Such, however, is not the law. (*Woollcott* v. *Shubert, supra,* p. 216; *Collister* v. *Hayman, supra,* p. 253.)

Plaintiff's argument results from confusion between a "license", imposed for the purpose of regulation or revenue, and a "franchise". A franchise is a special privilege, conferred by State on individual, which does not belong to the individual as a matter of common right. (See *Smith* v. *The Mayor*, 68 N. Y. 552, 555; *Penn-York Natural Gas Corporation* v. *Maltbie,* 164 Misc. 569, 573; *City of Tulsa* v. *Southwestern Bell Telephone Co.*, 75 F. 2d 343, 350.) It creates a privilege where none existed before, its primary object being to promote the public welfare. (See *e. g., Southern Ry. Co.* v. *South Carolina Public Service Commission,* 31 F. Supp. 707, 711; *City of Oakland* v. *Hogan,* 41 Cal. App. 2d 333, 347.) A familiar illustration is the right to use the public streets for the purpose of maintaining and operating railroads, waterworks and electric light, gas and power lines.

A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare. The grant of a license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the licensee under obligation to the public. (*Woollcott* v. *Shubert, supra; Collister* v. *Hayman, supra*). In the *Woollcott* case (*supra*) for instance, where the power of a theatre owner to bar a critic from his theatre was upheld, this court wrote (217 N. Y., at p. 216): "At the common law a theatre, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, is in no sense public property or a public enterprise. * * * The proprietor does not derive from the state the franchise to initiate and conduct it. His right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded." Likewise, race tracks may well be affected with a public interest sufficient to justify governmental licensing or other regulation. Recognition of a public interest, however, is neither recognition nor acknowledgment that the State is a partner in the business of horse racing or that the race track operator is the State's administrative agent to collect revenue.

Observing, however, that the conduct of races for stakes had long been declared illegal "except as specially authorized," plaintiff argues from that that the license was in effect a franchise, since it granted a privilege not previously enjoyed by common right. That, though, overlooks the fact that the privilege of conducting horse races for stakes does exist at the common law, that it is taken away only by statute, and that the statute's prohibition is removed only under certain circumstances and upon com-

pliance with specified conditions. (See *Corrigan* v. *Coney Island Jockey Club, supra;* cf. *Marrone* v. *Washington Jockey Club, supra; Western Turf Association* v. *Greenberg* 204 U. S. 359.) Consequently, the license, instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute.

In short, plaintiff's right to equal accommodation must rest either upon common law or upon statutory provision. No such right existed at common law and the Legislature has not chosen to create one. (Civil Rights Law, §§ 40, 40-b.)

The judgment should be affirmed, with costs.

Loughran, *Ch. J.*, Lewis, Conway, Desmond, Thacher and Dye, *JJ.*, concur.

Judgment affirmed.